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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 72-123

JAMES LEE GUTHRIE,

Petitioner,

vs.

THE STATE OF ARIZONA and GARY K. NELSON, as Attorney General of the State of Arizona,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ARIZONA

GARY K. NELSON
The Attorney General of
the State of Arizona

JOHN S. O'DOWD
Assistant Attorney General
415 West Congress
Tucson, Arizona

Attorneys for Respondent

ARGUMENT

I. RESPONDENT'S ARGUMENT THAT DENIAL OF DEFENSE MOTION FOR CONTINUANCE DID NOT DEPRIVE PETITIONER OF EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS OF LAW

Under Rule 241 of Arizona Rules of Criminal Procedure, the party moving for a continuance must show good cause and the granting of the motion is within the discretion of the trial court. As was stated by the Arizona Supreme Court in its opinion in this cause, as shown on page 45 of Petitioner's Brief, the petitioner in this case failed to comply with the requirements of Rule 243, Arizona Rules of Criminal Procedure, in making his motion for continuance:

> The defendant, however, failed to comply with Rule 243, Rules

> of Criminal Procedure, in not filing with his motion a "certificate of good faith" and his failure to comply with Rule 244 in not setting forth the facts expected to be proved by the witness, the name and residence of the witness, the facts showing due diligence to obtain the witness' presence and facts showing defendant expects to be able to procure the attendance of the witness at a specified time as required by that rule. See State v. Saiz, 3 Ariz.App. 223, 413 P.2d 282 (1966).

Since the trial had been pending since August, 1969, and since defense counsel knew of the witness' testimony when interviewing her 45 days before trial, the denial of the continuance motion made two days before the August 13, 1970 trial date was certainly within the sound discretion of the trial court

II. RESPONDENT'S ARGUMENT THAT COURT DID NOT DENY COMPULSORY PROCESS AND DUE PRO-

CESS TO PETITIONER
BY FAILING TO GRANT
A NEW TRIAL

As was stated by the Arizona Supreme Court in its opinion in this cause, as shown on pages 46 and 47 of Petitioner's Brief, the trial court:

> . . .was faced with the fact that at the hearing the witness claimed her Fifth Amendment right and would obviously do the same at trial, and her statement in a new trial would not be admissible. In addition, the statement implicated the defendant in the case and showed that he was present when Miss S. was allegedly given the heroin for keeping, and thereafter Miss S. and the defendant were together at all times until the sale took place, although her version of the events at the sale differed from the state's. The showing made by the defense was not sufficient to justify the granting of a new trial. (cases cited).

Under the circumstances, Respondent submits that the trial court's ruling denying Petitioner a new trial was correct and that said ruling, as shown by the record, was based upon the finding that the evidence would not probably cause a different result. State v. Davis, 104 Ariz. 142, 449 P.2d 607 (1969)

III. RESPONDENT'S ARGUMENT THAT PETITIONER WAS NOT DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS OF LAW BY FAILURE OF COURT TO CALL DIEGO JAURAGUE AS ITS OWN WITNESS

The Arizona Supreme Court in its opinion in this cause, as shown on page 42 of Petitioner's Brief, pointed out that the trial judge stated as reasons for declining to call Jauragua as its

witness that such action might create the impression that the court doubted the other witnesses and the witness called by the court was somehow special. The Arizona Supreme further stated:

> Thus, in order not to leave the impression that the court was dissatisfied with the prosecution's case and to avoid placing special emphasis on one witness, the trial court denied the motion. It was within the discretion of the court to so rule, and there was no abuse of that discretion. (citing cases).

It is clear from the record in this case that Petitioner's counsel was given ample latitude in examining Jauragué. The witness appeared cooperative in answering the questions posed and at no time did Petitioner's counsel renew his motion to have the witness declared

hostile and uncooperative.

Clingan v. United States, 400 F.2d 489 (5th Cir., 1968) was clearly distinguishable as was pointed out to counsel for Petitioner by the trial judge. (R.T. 111) The following excerpt from the transcript shows that Petitioner was given ample latitude in bringing out testimony from Jauragué which impeached his credibility and was favorable to the defense.

> Q. (Defense Attorney) * * *On that date, May 7, 1969, were you working for the Tucson Police Department as a full time employee?
>
> A. No.
>
> Q. Did you get any money for what you did that particular night?
>
> A. No.
>
> Q. Have you been made any promises for what you might obtain -- strike that. Why were you there that night with John Martinez?

MR. WEISS: I believe the question is the same. I believe Mr. Thikoll is attempting to impeach his own witness and there has been no showing that the witness is hostile and no showing of surprise.

THE COURT: Overruled.

Q. Why were you there that night with John Martinez?

A. I had been arrested for the sale of marijuana and I talked to Detective Wolff and my lawyer. They told me if I helped, they would help me.

Q. Were you there that night with John Martinez trying to help your own case?

A. Yes.

Q. As a result of what you did that evening, was your case reduced?

A. Yes.

Q. Did you ever go to jail on your case after that?

THE COURT: I will sustain the objection from here on. (RT. 125-126)

As was stated by the Arizona Supreme Court in its opinion in this cause, as shown on page 44 of Petitioner's Brief:

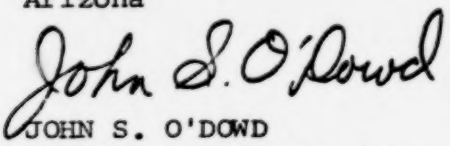
> What is important, no matter which way it is done, is whether defendant was given the opportunity to fully present his case. The wide range of questioning granted to the defendant and the defendant's failure to renew his motion as the court directed him to in the event the witness became uncooperative convinces us that there was no prejudice to the defense. (citing case).

CONCLUSION

WHEREFORE, Respondent prays that this court decline to accept jurisdiction in this cause and dismiss the petition herein.

Respectfully submitted,

GARY K. NELSON
The Attorney General of
Arizona



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eral
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August, 1972.